IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WRS, INC., d/b/a WRS MOTION PICTURE LABORATORIES, a corporation, Plaintiff, vs. PLAZA ENTERTAINMENT, INC., a corporation, ERIC PARKINSON, an individual, CHARLES von BERNUTH, an individual and JOHN HERKLOTZ, an individual, Defendants.	CIVIL ACTION No. 00-2041

PLAINTIFF'S BRIEF IN REPLY TO DEFENDANT HERKLOTZ'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO DAMAGES AGAINST DEFENDANT, JOHN HERKLOTZ

INTRODUCTION

Plaintiff WRS, Inc. (hereinafter, "WRS") has moved the Court for entry of Summary Judgment as to damages based upon its business records and the report of Schneider Downs, Inc. (hereinafter "Schneider Downs") that the business records were essentially reasonably maintained in the ordinary course of WRS's business. Defendant Herklotz has responded with a Response to WRS's Concise Statement supported by Herklotz Affidavit attesting to his business and financial acumen, revealing his deep knowledge and involvement with Plaza at the time he provided his Guaranty and mostly reiterating arguments previously made in his Motion for Partial Summary Judgment, which the Court denied and in opposition to WRS' Motion for Summary Judgment as to Liability which the Court granted.

Herklotz response critique's WRS credit policy with respect to Plaza, argues that the services agreement increased his risk, (in fact the WRS records demonstrated that the majority of payments received by WRS were through the lock box set up under the services agreement.) and points out various issues that he has with Parkinson, von Bernuth and Gehring whom Herklotz's

Brief, (probably accurately) characterizes as the "real bad actors." Herklotz's characterization crystallizes the legal issue which is, as between Herklotz and WRS who is responsible for the loss created by the "bad Actors.' WRS submits that the Court has answered this question by entering judgment as to liability. The liability judgment combined with the unconditional nature of Herklotz's suretyship undertaking and Herklotz's failure to plead mitigation or avoidable consequences as affirmative defenses, precludes consideration of these arguments in defense of the WRS Motion for judgment as to damages.

With respect to the actual calculation of the damages, although Herklotz gripes about the method employed by Schneider Downs, his ire is directed more at Schneider Downs' failure to scold WRS, rather than the accuracy of the WRS records. Finally, Herklotz mentions that his personal review of the WRS records suggests that the records are unreliable, Herklotz offers no firm evidence to alter the WRS calculations other than his argumentative assertion that his debt should be "0". WRS submits that Herklotz has failed to raise any genuine issues of material fact that would prevent the Court from granting WRS' Motion for Judgment as to damages.

ARGUMENT

I. The Affirmative Defenses Of Failure To Mitigate Damages And Avoidable Consequences Are Not Defenses Available To Herklotz

The Court in its Memorandum in Support of the entry of Judgment as to liability recognized that Herklotz was a compensated surety thus limiting his defenses. As the Minutes of Plaza Board of Directors attached as Exhibit "16" to Herklotz Affidavit demonstrate, not only was Herklotz interested in Plaza as the potential distributor of his film "Giant of Thunder Mountain" he was also, a creditor having lent Plaza about 1.3 Million, and was actively involved in attempts to find more credit, even offering his personal guaranty and personal property as collateral. His resume also demonstrates that Herklotz was a seasoned businessman, financier and entrepreneur when he gave his unconditional guaranty to WRS. Thus, the consequences of his unconditional commitment to stand as surety should have been well understood by Herklotz.

Herklotz's primary assertion in Defense to WRS's Motion is that WRS failed to mitigate its damages by continuing to do business with Plaza after WRS received Herklotz Guaranty when it was not receiving payment and because WRS and Plaza entered into the Services Agreement. Herklotz characterizes this as "behavior designed to maximize Defendant Herklotz liability under the Guaranty."

First, the very purpose of giving the Guaranty was to get WRS to perform services for Plaza that WRS had refused to perform. In particular the duplication of Herklotz film. (see: Herklotz Affidavit 23 through 28). Herklotz was also aware that Plaza's plans called for the distribution of other films (Herklotz Affidavit Exhibit "16") The Guaranty contemplated a continuing relationship. Herklotz "remedy" was to cancel the guaranty. Herklotz has never contended that he made any effort to cancel. Second, WRS had a right to and did rely upon Herklotz unconditional Guaranty.

The unconditional guaranty is an absolute undertaking. Fireman's Fund v. Joseph J. Biafore, Inc. 526 F.2d 70(1975) Continental Leasing Corp v. Lebo, 217 Pa Super. 356, 272 A.2d 193 (1970). It is an unbridled commitment to pay CitiCorp North America, Inc. v. George W. Thorton, ___Pa. Super.___, 707A.2d 536 (1998). The only defenses available to an unconditional guarantor are payment or performance. Parker Hannifin Corp. Bradshaw, 1993 U.S. Dist LEXIS 17922(E.D.PA. 1993), the consequence is to relieve the creditor of the unconditional Guarantor of the duty to mitigate damages. Paul Revere Protective Life, Ins. Co. v. Weis, 535 F.Supp. 370 (E.D. Pa. 1981). Aff'd 707 F.2d 1403(3rd Cir 1982).

Furthermore failure to mitigate damages is an affirmative defense that must be pleaded . F.R.C. P 8. There is some confusion in that Herklotz has identified and included in is Appendix the Answer filed in the now dismissed action at 03-1398. The pleadings in this case were closed in 2000 and the Answer and Affirmative Defenses filed on Herklotz's behalf by his original counsel does not aver failure to mitigate or avoidable consequences as affirmative defenses. Thus, not only are the defenses not legally cognizable in an action against an unconditional guarantor, Herklotz has waived them by failing to raise them as affirmative defenses.

Finally, to support the affirmative defenses, Herklotz has the duty not just to suggest that the WRS records might be inaccurate, but must produce affirmative evidence that would enable the Court to quantify the amount by which WRS damages might have been mitigated by its own actions. Golden Oil Co. v. Exxon Co., U.S.A., 543 F.2d 548 (5th Cir. 1976), SBA Network Services, Inc. v. Telecom Procurement Services, Inc2006 U.S. Dist. LEXIS 62234 (W.D. Pa. 2006). Herklotz has not offered any such evidence, other than his erroneous legal argument claiming that he should not owe anything. This is especially disingenuous when much of the increase in the debt was caused by orders for his film "Giant of Thunder Mountain." For these reasons, WRS submits that Herklotz has not established a legal basis for support the existence of a genuine issue of material fact . Accordingly, WRS's Motion for Summary Judgment as to damages should be granted.

II. Herklotz's Response To WRS's Concise Statement Establishes That There Is No Genuine Issue Of Material Fact As The WRS's Damages.

In response to the WRS's Concise Statement, Herklotz answered in a manner that WRS submits, admitted the material facts that demonstrate no genuine issue of material fact exists concerning WRS's damages. Most of Herklotz response reiterates the legal arguments that WRS submits are now precluded by the Court's entry of judgment as to liability. However, Herklotz's response to paragraphs 8, 9, 10,11,12, 13,14, 15, and 16, failed to meet and contradict WRS's factual averments that in summary establish each element of WRS' claim.

In particular, Herklotz did not meet WRS factual statement in paragraphs 8 and 9, regarding the provision in the terms and conditions that precluded challenges to the WRS invoices unless request for adjustments were made within 30 days. WRS averred in its concise statement that Herklotz could not produce any evidence of a challenge to any of WRS's invoices. Herklotz, despite the volume of his submission, has not produced any evidence that Plaza challenged any of the WRS invoices as required by the admitted and governing Terms and Conditions. Thus, Herklotz is now prohibited from questioning the invoice amounts in opposition to WRS's Motion.

Paragraph 10 of WRS's Concise Statement established the basis for WRS's claim for interest at the rate of 1 ½% per month. Herklotz has not countered this statement with a factual contradiction. Accordingly, WRS submits that it is admitted.

Paragraphs 11 and 12 of WRS's Concise Statement set out the basis for and the amount of WRS's claim for attorney's fees. Herklotz's response argues that the fees include "general business advice." However, Herklotz fails to point to any specific time entry to support this contention. As WRS Reply indicates, all of the fees were incurred in efforts to recover the Plaza receivable including efforts to evaluate WRS's ability to exploit the content of the films it duplicated for Plaza as provided in the Terms and Conditions and evaluating the EnterTech proposal as a means of reducing or recovering the Plaza debt. WRS submits that Herklotz's Response fails to establish a genuine issue of fact regarding Herklotz 's liability for, or the amount of WRS's attorney's fees, as a component of its damages.

Paragraph 13 addressed the promise by Plaza to pay storage charges for the Storage of Plaza materials at WRS. As pointed out above, Herklotz has admitted the applicability of the Terms and Conditions that provide for the storage charges. WRS, through the Napor Affidavit established the monthly storage charge for the Plaza Material. Herklotz has not provided any evidence to contradict WRS's statement. Accordingly, WRS submits that Herklotz has admitted the storage charges as a component of WRS's damages and the amount calculated by the Napor Affidavit.

Paragraph 14 calculates the minimum amount of monthly fees owed to WRS by Plaza under the Services Agreement from November 1998 to December 2000. The Services Agreement established that the monthly fee would be a minimum of $5000. Herklotz does not dispute the language of the Services Agreement. The records of WRS show that payments were received from the lock box established. (Napor Depo pp121 to 128 Herklotz Appendix to Herklotz Reply Brief). The records established that Plaza did not pay the fee due under the Services Agreement. The lock box never generated sufficient funds to pay the fee so all collections were applied to the account balance. (Napor Supplemental Affidavit in Support of Motion for Summary Judgment as to Damages)

Paragraphs 15 and 16 simply calculate the amount due based upon the WRS records as verified by Schneider Downs. Herklotz did not contradict the calculations nor has Herklotz shown any other credits to reduce the amounts WRS, therefore, submits that Herklotz has both, admitted the calculations of the amounts owed and failed to establish any genuine issue over the quantification of WRS's damages.

In summary, because of the manner in which Herklotz Responded to WRS's Concise Statement by reiterating Legal arguments that are precluded by the Court's liability judgment, rather than raising specific factual contradictions, Herklotz has admitted the facts contained in WRS's Concise Statement. Not only does Herklotz's response demonstrate that there is no genuine issue of fact concerning the amount of damages, but also Herklotz's Response admits facts sufficient establish WRS's damage claim.

III. The Remainder Of Herklotz's Contentions Do Not Establish The Existence Genuine Issues Of Material Fact Regarding The Amount Of Damages.

The remainder of the items mentioned in Herklotz Affidavit point out insignificant details of the account relationship ignoring the overall reasonableness and accuracy of the WRS records upon which it has calculated its damages. The records provided to Herklotz by WRS represented the development of the account balance over time, from early 1998 until the September 2005 Account Receivable Management report attached to the Napor Affidavit. The reliability of these records is based upon the entries having been made contemporaneously with the services WRS provided and when payments received.

Herklotz suggests that the Account Receivable Management Report attached to the Napor Affidavit is out of chronological sequence. However, the report shows the application of the payments as received to the oldest invoice outstanding at the time. Those are payments verified by Schneider Downs.

Herklotz also suggests a genuine issue of fact is established by three purchase orders sent to WRS by Library Video for Plaza titles. These invoices represent efforts by WRS to reduce the Plaza receivable by selling Plaza titles that it was storing, a right granted by the Terms & Conditions admitted by Herklotz. The three invoices (Exhibits"17' to his affidavit) total $446.07. These invoices are not included in the amount of the WRS claim and would be credited to the account only if and when actually paid by the purchaser. To the best of WRS information the $446.07 was not received by WRS. (Napor Supplemental Affidavit in Support of Motion for Summary Judgment as to Damages).

Herklotz mentions an undeposited check in the sum of $100,000. This check was never deposited because Plaza never had funds to cover the check. Certainly, WRS would have welcomed $100,000 in July of 1999. (Napor Supplemental Affidavit in Support of Motion for Summary Judgment as to Damages).

Herklotz also attaches to his Affidavit a Bank of America Lock Box Agreement a copy of which was sent to WRS. As can be seen from the Agreement, WRS is not a party to the Agreement and accordingly has no right thereunder. The transmittal of this document to WRS by Parkinson represented another failed effort by Plaza to demonstrate that payment of the receivable would be forthcoming. (Napor Supplemental Affidavit in Support of Motion for Summary Judgment as to Damages).

Finally, Herklotz 's Affidavit also mentions his efforts to determine the true amount of the outstanding debt. However, while making an effort to reconcile the amounts, he never arrives at an amount to contradict the total established by WRS records. Rather, he resorts to arguments as to why he should not owe the debt rather than addressing the amount that his calculations determined is owed. This is not sufficient to demonstrate am genuine issue of material fact.

In summary, Herklotz's critique does not substantially address the accuracy of the WRS records but argues about the fact that WRS extended credit to Plaza after he gave his Guaranty for which Plaza failed to pay. This critique does not establish genuine issues regarding the calculation of WRS damages. Therefore, Herklotz has not established a reason for the Court to deny WRS's Motion for Summary Judgment.

IV. Conclusion

As pointed out in the introduction, Herklotz would like the issue before this on this Motion as to damages to be the same as previously decided by the Court with respect to liability. That is, as between WRS and Herklotz, who was responsible for Plaza's debt. By executing the continuing and unconditional guaranty and becoming surety for Plaza's performance, Herklotz assumed this responsibility and now cannot complain. That Herklotz's "dispute" is more appropriately directed to the other Defendants and perhaps his former Attorney, Thomas Gehring, is demonstrated by the discussion in his Affidavit about Parkinson von Bernuth and Gehring and his inclusion of bills from Gehring's firm Jenkins & Gilchrist. However, Herklotz recourse for indemnity or contribution against these "real bad actors" will not mature, as a matter of law, until he honors his promise as surety to WRS and pays the Plaza debt in the amount established by the Napor Affidavit. Hoff v. Kauffman, 282 Pa. 471, 128 A. 120, 1925 Pa. LEXIS 645 (1925). For the reasons set forth above, WRS respectfully submits that the Court should grant its Motion for Summary Judgment as to Damages and enter judgment in the sum of $2,527,029.03 with interest to accrue at the of 1.5 percent per month on the sum of $1,205,827.84 from October 13, 2006 plus and additional attorneys fees through December 19, 2006 in the sum of $6,020.00 as shown in the Supplemental Affidavit of Thomas E. Reilly with additional fees to be added for proceedings to enforce the judgment.

Respectfully submitted,

THOMAS E. REILLY, P.C.

BY: /s/ Thomas E. Reilly

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CERTIFICATE OF SERVICE

I, Thomas E. Reilly, Esquire, hereby certify that a true and correct copy of the PLAINTIFF'S BRIEF IN REPLY TO DEFENDANT HERKLOTZ'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO DAMAGES AGAINST DEFENDANT, JOHN HERKLOTZ was delivered via first-class mail, postage pre-paid on the __19th__ day of December, 2006 to the following:

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BY: ___/s/ Thomas E. Reilly_____
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